

**UNITED STATES DISTRICT COURT**  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AMAZON.COM, LLC,

Plaintiff,

v.

DAVID W. HOYLE,

Defendant.

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JANE DOES 1-6, and CECIL BOTHWELL,

Plaintiffs-Intervenors

v.

DAVID W. HOYLE and AMAZON.COM,  
LLC,

Defendants in Intervention

**JUDGMENT IN A CIVIL CASE**

CASE NUMBER: C10-664 MJP

- ☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

**THE COURT HAS ORDERED THAT**

On October 25, 2010, the Court granted Amazon.com LLC's motion for summary judgment on all claims except Amazon.com LLC's state constitutional claims. Amazon.com LLC has since amended its complaint to remove those claims. The Plaintiffs-Intervenors have separately filed a stipulated judgment, dismissing their claims, which the Court has accepted. (Dkt. Nos. 75, 76). Judgment is entered in favor of Amazon.com LLC, as set forth in the Court's order on Amazon.com LLC's summary judgment motion. This matter is now closed.

Dated January 28, 2011.

William M. McCool  
Clerk of Court

s/Mary Duett  
Deputy Clerk

## RESOLUTION AGREEMENT

Intervenors Jane Does 1 through 6 and Cecil Bothwell ("Intervenors") and defendant-in-intervention Secretary David W. Hoyle, in his official capacity as the Secretary of the North Carolina Department of Revenue ("Department"), enter into this resolution agreement ("Resolution Agreement" or "Agreement") effective this 19th day of January 2011.

WHEREAS, Amazon.com LLC ("Amazon") filed a complaint against the Department in the United States District Court for the Western District of Washington, captioned *Amazon.com LLC v. Hoyle*, No. 2:10-cv-00664-MJP ("the Action");

WHEREAS, Intervenors, represented by the American Civil Liberties Union ("ACLU"), filed a complaint in intervention in the Action;

WHEREAS, the Department filed motions to dismiss Amazon's complaint and the complaint in intervention, and Amazon filed a motion for summary judgment;

WHEREAS, the Court heard arguments on the motions and issued a decision on October 25, 2010 ("Order"), denying the Department's motions to dismiss and granting Amazon's motion for summary judgment;

WHEREAS, the Court's decision granting limited declaratory relief to Amazon resolved the majority of the claims raised in the complaint in intervention;

WHEREAS, the Department subsequently filed an answer to the complaint in intervention; and

WHEREAS, the Department and Intervenors desire to enter into this Resolution Agreement to resolve any remaining issues without further litigation.

### **NOW IT IS HEREBY AGREED:**

1. In its Order, the Court held that "much of the declaratory and injunctive relief sought [by Intervenors] overlaps with the declaratory relief issued by this order." In light of that holding, without conceding the correctness of that holding or the Court's decision and solely to resolve this matter without further litigation, the Department stipulates that Intervenors are entitled to the same limited declaratory relief that the Court granted to Amazon in its Order. The parties will submit a stipulated judgment to the Court granting that same relief upon execution of this Agreement.

2. Intervenors agree to file a notice of voluntary dismissal with prejudice of the remaining claims for relief in the complaint in intervention not addressed in the stipulated judgment within three business days of the submission of the stipulated judgment to the Court.

3. Intervenors and the ACLU agree not to file any other action with respect to the information document requests ("IDRs") at issue in this Action or any other similarly worded previously issued IDR. However, should the Department commence proceedings related to the

IDRs at issue in this Action, Intervenor and the ACLU reserve the right to seek to intervene in any such proceeding and to raise any issues they deem fit, including those raised in the complaint in intervention.

4. The Department agrees, upon receipt of notice of filing of voluntary dismissal, to pay attorneys' fees and costs in the amount of \$99,000.

5. The Department agrees that it will not appeal the Court's Order or any final judgment entered by the Court. In the event that Amazon files an appeal of the Court's October 25 decision, the Department reserves the right to file a cross-appeal and/or to otherwise respond to such an appeal. Intervenor similarly reserve the right to file their own cross-appeal or brief in connection with any such appeal filed by Amazon. The filing of an appeal by Amazon will not render this Agreement invalid or unenforceable. If such an appeal is commenced, the parties agree that Intervenor shall not be precluded from requesting attorneys' fees and costs associated with work performed in connection with that appeal.

6. The Department agrees that it will include the following statement on any information document request ("IDR") issued to an internet retailer that sells books, movies, music or other expressive items and that also requests customer names: "This IDR does not request the names, titles or other identifying information from which names and titles can be derived of the books, movies, music or other expressive items sold."

7. This Agreement does not preclude the Department from proposing assessments of sales or use tax against Amazon or its customers, including Intervenor.

8. This Agreement does not constitute a concession, agreement or admission by the Department or Intervenor as to the correctness or applicability of any legal or factual contention of the other parties.

9. This Agreement may only be amended by written agreement of all parties. Any amendment shall be attached to and become part of this Agreement.

10. This Agreement shall be governed by the laws of the State of North Carolina.

11. This Agreement is final and conclusive except the matter to which it relates may be reopened in the event of fraud, malfeasance, noncompliance or misrepresentation of material fact. The finality of this Agreement is not contingent on any further action by the Court.


12. By signing this Agreement, the Department and Intervenor, by and through their counsel, certify that they have read and agreed to all of the terms hereof and that they have the authority to enter into this Agreement.

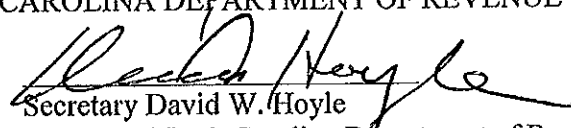
INTERVENOR, BY AND THROUGH THEIR COUNSEL

By:

Name:   
Aden Fine

Title: Counsel for Intervenors  
Date: 1/20/11

AMERICAN CIVIL LIBERTIES UNION  
By:   
Name: Aden Fine  
Title: Counsel for Intervenors  
Date: 1/20/11

NORTH CAROLINA DEPARTMENT OF REVENUE  
By:   
Name: Secretary David W. Hoyle  
Title: Secretary, North Carolina Department of Revenue  
Date: 1-19-11

11CV001857

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

FILED IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
2011 FEB 14 11:31

File No.:  
CASE NO. 11-0306

BY \_\_\_\_\_

ORBITZ, LLC, TRIP NETWORK, INC.  
(d/b/a CHEAPTICKETS.COM),  
TRAVELOCITY.COM LP,  
TRAVELSCAPE, LLC, HOTELS.COM  
L.P., and HOTWIRE, INC.,

Plaintiffs,

v.

COMPLAINT AND ACTION  
FOR DECLARATORY JUDGMENT

DAVID HOYLE, SECRETARY OF  
REVENUE OF THE STATE OF NORTH  
CAROLINA; THE NORTH CAROLINA  
DEPARTMENT OF REVENUE; and  
DURHAM COUNTY,

Defendants.

Plaintiffs ORBITZ, LLC, TRIP NETWORK, INC. (d/b/a CHEAPTICKETS.COM),  
TRAVELOCITY.COM LP, TRAVELSCAPE, LLC, HOTELS.COM L.P., and HOTWIRE, INC.  
(collectively, "Plaintiffs"), by their undersigned attorneys, allege for this Complaint and Action  
for Declaratory Judgment as follows:

#### PRELIMINARY STATEMENT

1. Plaintiffs are online travel companies that provide a service to consumers to facilitate the bookings of hotel rooms and other travel arrangements. Legislation recently enacted by the State of North Carolina purports to modify Plaintiffs' contracts with hotel operators in North Carolina to impose new tax obligations on Plaintiffs in connection with their services.

2. The legislation amended N.C. Gen. Stat §§ 105-164.4, 105-164.4B, 153A-155, and 160A-215 (the "Amendments"). The Amendments were enacted by the North Carolina General Assembly ("Legislature") and signed by the Governor on June 30, 2010, as section 31.6 of N.C. Sess. Law 2010-31 (S.B. 897). The Amendments were effective January 1, 2011, but affect Plaintiffs' contracts entered into before the stated effective date, as well as Plaintiffs' current business activities.

3. A copy of the Amendments is attached as Exhibit A.

4. The Amendments purport to create a new classification, "facilitators," that applies to Plaintiffs.

5. The Amendments purport to modify the terms and conditions of contracts between facilitators and hotel operators so as to impose certain obligations on facilitators in connection with the state sales tax imposed by N.C. Gen. Stat. § 105-164.4 and county sales taxes imposed pursuant to the authority granted in Subchapter VIII of Chapter 105 (collectively, the "Sales Tax"), and with the county and municipal room occupancy taxes authorized by various local enabling acts passed by the Legislature and levied by counties and municipalities authorized pursuant to those enabling acts (the "Room Occupancy Taxes").

6. The Amendments further purport to require the inclusion of fees paid to facilitators by consumers for the provision of travel facilitation services in the "gross receipts" of hotel operators that are subject to Sales Tax and Room Occupancy Taxes, even though such amounts are not receipts of hotel operators and represent compensation for services that are performed by facilitators.

7. The Amendments illegally and unconstitutionally impose Sales Tax and Room Occupancy Taxes on amounts charged by Plaintiffs for their travel facilitation services and illegally and unconstitutionally modify Plaintiffs' contracts to impose Sales Tax and Room Occupancy Tax obligations on Plaintiffs.

8. The Amendments also subject companies that facilitate travel reservations via the Internet to additional obligations under Sales Tax and Room Occupancy Tax laws that are not imposed on in-state persons who provide similar services not conducted over the Internet.

9. This case directly concerns electronic commerce and the regulation of business conducted via the Internet.

#### **THE PARTIES**

10. Plaintiff Orbitz, LLC is a limited liability company organized under Delaware law with its principal place of business in Chicago, Illinois.

11. Plaintiff Trip Network, Inc. (d/b/a Cheaptickets.com) is a Delaware corporation with its principal place of business in Chicago, Illinois.

12. Plaintiff Travelocity.com LP is a limited partnership organized under Delaware law with its principal place of business in Southlake, Texas.

13. Plaintiff Travelscape, LLC (d/b/a Expedia Travel) is a limited liability company organized under the laws of Nevada with its principal place of business in Las Vegas, Nevada.

14. Plaintiff Hotels.com L.P. is a Texas limited partnership with its principal place of business in Dallas, Texas.



15. Plaintiff Hotwire, Inc. is a Delaware corporation with its principal place of business in San Francisco, California.

16. Defendant David Hoyle is the Secretary of Revenue of the State of North Carolina and is the head of the North Carolina Department of Revenue. He is named solely in his official capacity.

17. Defendant North Carolina Department of Revenue is the state agency responsible for all executive functions of the State of North Carolina in relation to revenue collection, tax research, and tax settlement. Its principal office is located at 501 North Wilmington Street, Raleigh, Wake County, North Carolina.

18. Defendant Durham County is a county organized under the laws of North Carolina which levies a Room Occupancy Tax.

#### **JURISDICTION**

**A. Jurisdiction Pursuant to the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.***

19. Jurisdiction over this case is conferred on and vested in this Court by the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.*, to determine how the Amendments affect the rights and duties of Plaintiffs and to determine whether the Amendments are legal and proper.

20. "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form

and effect; and such declarations shall have the force and effect of a final judgment or decree.”

N.C. Gen. Stat. § 1-253.

21. N.C. Gen. Stat. §§ 105-241.11 – 105-241.19 set forth the exclusive procedures for a “taxpayer” to challenge a proposed assessment of Sales Tax, a proposed denial of a Sales Tax refund claim, or the constitutionality of a Sales Tax statute.

22. A “taxpayer” is barred from seeking a declaratory judgment in connection with its Sales Tax obligations by N.C. Gen. Stat. § 105-241.19.

23. “Taxpayer” is defined as “[a] person subject to the tax or reporting requirements” of, *inter alia*, the Sales Tax. N.C. Gen. Stat. § 105-228.90(b)(8).

24. Plaintiffs are not “taxpayers” within the meaning of N.C. Gen. Stat. § 105-228.90(b)(8) and therefore are not barred by N.C. Gen. Stat. § 105-241.19 from bringing this action for declaratory judgment.

25. Plaintiffs do not have a valid remedy under N.C. Gen. Stat. § 105-241.7 *et seq.*

26. The administrative remedies provided in N.C. Gen. Stat. § 105-241.7 *et seq.* do not apply to Plaintiffs.

27. The provisions of N.C. Gen. Stat. §§ 105-241.11 – 105-242.19 do not apply to Room Occupancy Taxes.

28. Durham County does not provide administrative remedies to dispute the Room Occupancy Tax that it imposes.

29. No administrative agency can provide the relief that the Plaintiffs seek, which is the invalidation of statutes enacted by the Legislature, as applied to Plaintiffs.

30. No administrative remedy is available that would provide relief to Plaintiffs commensurate with their claims.

31. Therefore, a declaratory judgment is proper.

**B. Jurisdiction Pursuant to N.C. Gen. Stat. § 105-241.17**

32. In the alternative, if Plaintiffs were construed to be “taxpayers” within the meaning of Chapter 105, Article 9, of the North Carolina General Statutes (which construction Plaintiffs assert would be incorrect), then N.C. Gen. Stat. § 105-241.17 establishes the right of Plaintiffs under the circumstances of this case to assert the constitutional challenges stated in this Complaint in the first instance before the Wake County Superior Court.

33. N.C. Gen. Stat. § 105-241.17, captioned “Civil action challenging statute as unconstitutional,” provides that “[a] taxpayer who claims that a tax statute is unconstitutional may bring a civil action in the Superior Court of Wake County to determine the taxpayer’s liability under that statute if all of the conditions in this action are met.”

34. The “conditions” identified in N.C. Gen. Stat. § 105-241.17 all pertain to the exhaustion of the remedies found in N.C. Gen. Stat. § 105-241.11 through -241.16. These statutes are solely remedial statutes addressing claims for refund or challenges to assessments.

35. Plaintiffs in this case have not asserted and have no right to assert a claim for refund.

36. The State has not made an assessment that Plaintiffs could challenge pursuant to N.C. Gen. Stat. §§ 105-241.11 through -241.16.

37. The “conditions” identified in N.C. Gen. Stat. § 105-241.17 (and, by extension in N.C. Gen. Stat. §§ 105-241.11 through -241.16) are thus inapplicable to Plaintiffs’ claims asserted in this action.

38. Where the “conditions” to bringing a civil action identified in N.C. Gen. Stat. § 105-241.17 cannot under the circumstances be met, taxpayers are allowed to file a civil action under N.C. Gen. Stat. § 105-241.17.

39. N.C. Gen. Stat. §§ 105-241.17 and 105-241.19 require that a taxpayer bring a civil action challenging the constitutionality of a tax statute in the first instance in the Wake County Superior Court pursuant to N.C. Gen. Stat. § 105-241.17.

40. Accordingly, if this Court determines that Plaintiffs are “taxpayers,” N. C. Gen. Stat. § 105-241.17 provides a jurisdictional basis for the constitutional claims alleged in this Complaint and Action for Declaratory Judgment.

#### VENUE

41. Venue is proper under N.C. Gen. Stat. § 1-82, because the City of Raleigh, the seat of government of the State of North Carolina and the location of the principal office of the North Carolina Department of Revenue, is located in Wake County.

## FACTUAL ALLEGATIONS

### A. Background

42. Third-party intermediaries ("TPIs"), including traditional travel agents, have provided travel facilitation services for over 100 years.

43. TPIs connect travel suppliers (hotel operators, airlines, rental car companies, etc.) and consumers, helping parties do business with one another.

44. TPIs typically work with consumers to identify lodging and other travel options and to place reservations on consumers' behalf. TPIs typically research and identify travel options and then market trips and accommodations to consumers. In some cases, TPIs market integrated travel packages offered for a single price. Package components may include any combination of hotel, air, car rental, sightseeing, special events and admission tickets, ground transportation, meals, travel insurance and additional elements. TPIs typically receive fees for the services they perform as intermediaries.

45. Plaintiffs are TPIs that offer travel planning and booking services to consumers.

46. Specifically, Plaintiffs are Internet-based TPIs, also known as "online travel companies."

47. Through their websites, Plaintiffs collect and publish travel-related information, provide online travel planning tools, and (among other things) facilitate hotel reservations for consumers.

48. Plaintiffs' services benefit consumers by reducing the need for consumers to conduct their own independent travel research. Rather than checking maps, directories, and brochures to identify hotels located in the desired destination and then contacting hotel operators directly for information on amenities, availability, and pricing, consumers use Plaintiffs' websites to plan and book their trips.

49. Plaintiffs perform valuable services for both consumers and travel suppliers, such as hotel operators. By efficiently matching consumers with travel suppliers, Plaintiffs make travel easier, more accessible, and more affordable.

#### **B. The Prepaid Model**

50. Plaintiffs generally book hotel rooms for consumers on a prepaid basis, where a consumer pays a Plaintiff at the time the consumer makes the reservation (the "Prepaid Model").

51. The booking of a hotel room online under the Prepaid Model comprises two distinct transactions.

52. One transaction is between the consumer and the hotel operator. The hotel operator provides accommodations to the consumer. In exchange, the hotel operator receives an amount for the rental of the hotel room (the "Room Rental Charge").

53. The second transaction is between the consumer and a Plaintiff. A Plaintiff provides the consumer with an online service that allows the consumer to, among other things, research available hotel rooms, to request the Plaintiff to make a reservation at the

selected hotel, and to obtain the reservation. In exchange, the Plaintiff receives compensation from the consumer for its travel facilitation services (the "Facilitation Fee").

54. Plaintiffs are not hotels, nor have they ever owned, operated or managed hotels.

55. Plaintiffs do not provide hotel rooms to consumers, grant hotel room occupancy to consumers, or grant consumers the right to occupy hotel rooms.

56. Plaintiffs do not buy, take title to, or obtain any possessory interest in any hotel rooms, and they do not rent hotel rooms to consumers.

57. Under the Prepaid Model, hotel operators enter into contracts with Plaintiffs that describe the business relationship between hotel operators and Plaintiffs (the "Hotel Contracts").

58. Under the Prepaid Model, when a reservation is made for a consumer at a hotel, the Plaintiffs will forward to the hotel operator the Room Rental Charge, together with any state and local taxes charged by the hotel operator (for example, Sales Tax and Room Occupancy Taxes) based on the Room Rental Charge.

59. When booking hotel rooms for consumers under the Prepaid Model, the payment from a consumer to a Plaintiff typically includes the Room Rental Charge, a tax recovery charge to cover anticipated state and local taxes expected to be charged by the hotel operator (the "Tax Recovery Charge"), and the Facilitation Fee.

60. Plaintiffs do not receive the Facilitation Fee for the rental of hotel rooms.

61. Plaintiffs subsequently forward to the hotel operator the Room Rental Charge together with the state and local taxes invoiced by the hotel operator, typically after the consumer's stay has occurred. Plaintiffs retain the Facilitation Fee as payment for their services.

62. The hotel operator then remits applicable taxes to the appropriate taxing authorities.

### **C. The Structure of the Sales Tax**

63. North Carolina imposes the Sales Tax as part of a combined sales and use tax structure, known as the North Carolina Sales and Use Tax Act ("Sales Tax Act").

64. The Sales Tax is a privilege tax imposed on retailers, which is calculated based upon the retailer's net taxable sales or gross receipts. N.C. Gen. Stat. § 105-164.4(a).

65. The justification for imposing the Sales Tax on retailers is that North Carolina is entitled to impose a tax in exchange for giving a person the privilege of engaging in the business of retailing.

66. The Sales Tax Act defines "retailer" as including a person who is "engaged in the business of ... [m]aking sales at retail, offering to make sales at retail, or soliciting sales at retail of tangible personal property, digital property, or services for storage, use, or consumption in this State." N.C. Gen. Stat. § 105-164.3(35).

67. "In this State" means "[w]ithin the exterior limits of the State of North Carolina, including all territory within these limits owned by or ceded to the United States of America." N.C. Gen. Stat. § 105-164.3(14).



68. The Sales Tax Act defines “engaged in business” as including the acts of “maintaining ... any ... place of business for selling or delivering tangible personal property, digital property, or a service for storage, use, or consumption in this State,” or “permanently or temporarily, directly or through a subsidiary, having any representative, agent, sales representative, or solicitor operating in this State in the selling or delivering.” N.C. Gen. Stat. § 105-164.3(9).

69. The Sales Tax Act defines “sale at retail” as “[t]he sale, lease, or rental for any purpose other than for resale, sublease, or subrent.” N.C. Gen. Stat. § 105-164.3(34).

70. The Sales Tax is imposed on the retailer, but the retailer is required to collect the tax from the “purchaser” at the time of sale so that the tax is “borne by the purchaser instead of by the retailer.” N.C. Gen. Stat. § 105-164.7.

71. The Sales Tax Act provides that a “purchaser” includes a person who acquires property or a service for consideration, regardless of whether “the acquisition was effected by a transfer of title or possession, or both, or a license to use or consume.” N.C. Gen. Stat. § 105-164.7(32).

**D. The Sales Tax and Durham’s Room Occupancy Tax Applied to the Rental of Hotel Rooms Prior to the Amendments**

72. The Sales Tax applies to the rental of hotel rooms. N.C. Gen. Stat. § 105-164.4(a)(3) (amended eff. Jan. 1, 2011).

73. Until the effective date of the Amendments, with respect to the rental of hotel rooms, the Sales Tax Act limited the definition of “retailers” to “[o]perators of hotels, motels, tourist homes, tourist camps, and similar type businesses.” *Id.*

74. Until the effective date of the Amendments, the Sales Tax applied only to the amounts received by a hotel operator from the rental of hotel rooms to transients. *Id.*

75. Durham County levies a Room Occupancy Tax on the gross receipts from the rental of accommodations that are subject to the Sales Tax. Durham County Bd. of County Commissioners, Resolution Levying Room Occupancy Tax in Durham County (January 28, 2002).

76. Until the effective date of the Amendments, rentals of hotel rooms facilitated through the Plaintiffs’ websites under the Prepaid Model were subject to the Sales Tax and Room Occupancy Tax in the same way as other retail sales. The hotel operator, as the retailer, collected Sales Tax and Room Occupancy Tax on its gross receipts from the rental. The consumer bore the burden of the tax.

77. Until the effective date of the Amendments, the Facilitation Fee was not subject to the Sales Tax and Room Occupancy Tax because Plaintiffs were neither retailers nor purchasers of hotel accommodations.

#### **E. The Amendments**

78. The Amendments create a new class of persons in addition to retailers and purchasers, called “facilitators.”

79. A “facilitator” is “[a] person who is not a rental agent and who contracts with a provider of an accommodation to market the accommodation and to accept payment from the consumer for the accommodation.” N.C. Gen. Stat. § 105-164.4(a)(3).

80. Plaintiffs’ Prepaid Model transactions qualify Plaintiffs as facilitators under the Amendments.

81. The Amendments provide that a person “who provides an accommodation that is offered for rent is considered a retailer....” N.C. Gen. Stat. § 105-164.4(a)(3).

82. Hotel operators are retailers.

83. Because Plaintiffs provide facilitation services and do not provide accommodations, they are not retailers.

84. The Amendments provide that the Sales Tax is based on the retailer’s “gross receipts” and that “[g]ross receipts derived from the rental of an accommodation include the sales price of the rental of the accommodation.” N.C. Gen. Stat. § 105-164.4(a)(3). Further, the Amendments provide that the “sales price of the rental of an accommodation marketed by a facilitator includes charges designated as facilitation fees and any other charges necessary to complete the rental.” *Id.*

85. The Amendments purport to modify all of Plaintiffs’ contracts with North Carolina hotel operators. First, under the contract as purportedly modified, a “facilitator must report to the retailer with whom it has a contract the sales price a consumer pays to the facilitator for an accommodation rental marketed by the facilitator.” N.C. Gen. Stat. § 105-164.4(a)(3). Second, a “retailer must notify a facilitator when an accommodation rental marketed by the

facilitator is completed....” *Id.* Third, “... within three business days of receiving the notice, the facilitator must send the retailer the portion of the sales price the facilitator owes the retailer and the tax due on the sales price.” *Id.*

86. The Amendments provide that “the requirements imposed by this subdivision on a retailer and a facilitator are considered terms of the contract between the retailer and the facilitator.” *Id.*

87. The Amendments further provide that a “facilitator that does not send the retailer the tax due on the sales price is liable for the amount of tax the facilitator fails to send.” *Id.*

88. The Amendments provide that when a hotel room rental is made through one of Plaintiffs’ websites under the Prepaid Model, “the retailer is not liable for tax due but not received from a facilitator.” *Id.*

89. The Amendments also modify the Room Occupancy Taxes, because under the Amendments, Room Occupancy Taxes are based on the same “gross receipts” that are used to calculate the Sales Tax, thus incorporating Plaintiffs’ Facilitation Fees. N.C. Gen. Stat. §§ 153A-155, 160A-215.

90. Under the Amendments, a facilitator has the same responsibility and liability under the Room Occupancy Taxes, including Durham County’s Room Occupancy Tax, as under the Sales Tax. N.C. Gen. Stat. §§ 153A-155, 160A-215.

91. The Amendments have an effective date of January 1, 2011.

92. The Amendments allegedly apply to bookings of accommodations for stays scheduled on or after January 1, 2011, regardless of when the original booking was made.

93. Plaintiffs have facilitated bookings of accommodations in North Carolina for stays on or after January 1, 2011.

## COUNT I

### THE AMENDMENTS VIOLATE THE INTERNET TAX FREEDOM ACT

94. Plaintiffs incorporate by reference paragraphs 1 through 93.

95. The Amendments are targeted at the electronic commerce business model of Plaintiffs and other online travel companies.

96. The Internet Tax Freedom Act, Pub. L. 105-277, as amended, prohibits “[m]ultiple or discriminatory taxes on electronic commerce.” Internet Tax Freedom Act, as amended, § 1101(a)(2) (codified at 47 U.S.C. § 151 note).

97. The definition of a prohibited “discriminatory tax” under the Internet Tax Freedom Act includes “any tax imposed by a State or political subdivision thereof on electronic commerce that— (i) is not generally imposed and legally collectible by such State or political subdivision on transactions involving similar property, goods, services, or information accomplished through other means; (ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services or information accomplished through other means...; [or] (iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions

involving similar property, goods, services, or information accomplished through other means[.]” Internet Tax Freedom Act, as amended, § 1105(2)(A) (codified at 47 U.S.C. § 151 note).

98. “Electronic commerce” is defined as “any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access.” Internet Tax Freedom Act, as amended, § 1104(3) (codified at 47 U.S.C. § 151 note).

99. The Amendments violate Subsection (i) of the definition of a “discriminatory tax” because the Amendments have the effect of imposing Sales Tax and Room Occupancy Taxes on Plaintiffs’ electronic commerce transactions (i.e., service transactions over the Internet), but do not impose these taxes upon transactions involving similar or identical services accomplished by other, non-Internet based means.

100. The Amendments violate Subsection (ii) of the definition of a “discriminatory tax” because the Amendments have the effect of imposing Sales Tax and Room Occupancy Taxes on Plaintiffs’ electronic commerce transactions at a higher effective tax rate when compared to similar or identical transactions that are not provided online. The Amendments cause a higher effective tax rate to be imposed upon Plaintiffs’ electronic commerce-based services because the Amendments impose tax upon a higher tax base for such transactions (the Room Rental Rate and the Facilitation Fee) as compared to the tax base applied to transactions that are not conducted over the Internet (the Room Rental Rate only).

101. The Amendments violate Subsection (iii) of the definition of a “discriminatory tax” because the Amendments purport to impose a tax obligation upon Plaintiffs,

who provide travel facilitation services over the Internet, but not on persons engaged in similar transactions that are not conducted via electronic commerce.

102. In addition, the Amendments violate Subsection (iii) of the definition of a “discriminatory tax” because the Amendments purport to impose an obligation to collect or pay the tax on a different person or entity (the “Facilitator”) than in the case of transactions involving similar property, goods, services, or information accomplished through other means where the obligation to collect or pay the tax is imposed on the “retailer.”

103. Plaintiffs are informed and believe that Defendants contend that the Amendments do not violate the Internet Tax Freedom Act, Pub. L. 105-277, as amended, codified at 47 U.S.C. § 151 note.

104. A present, actual and justiciable controversy exists between the parties, requiring this Court to adjudicate their respective rights and duties.

105. Plaintiffs seek a declaration that (i) the Amendments are preempted by the Internet Tax Freedom Act, as amended, and cannot be enforced against Plaintiffs; and (ii) Plaintiffs are not required to comply with the Amendments.

## **COUNT II**

### **THE AMENDMENTS UNCONSTITUTIONALLY IMPAIR PLAINTIFFS’ CONTRACTS WITH HOTEL OPERATORS**

106. Plaintiffs incorporate by reference paragraphs 1 through 93.

107. Under article I, section 10, clause 2 of the United States Constitution: “No State shall ... pass any ... Law impairing the Obligation of Contracts....”

108. The Amendments attempt to alter the terms of Plaintiffs' Hotel Contracts.

109. The Amendments purportedly require Plaintiffs to notify hotel operators of the entire amount charged to the consumer for a hotel room under the Prepaid Model, including the amount retained as a Facilitation Fee.

110. The Amendments require that after receiving notice of a completed stay from a retailer, Plaintiffs must send the rental amount due the retailer and the tax due on the entire "sales price" within three business days from receipt of notice. N.C. Gen. Stat. § 105-164.4(a)(3).

111. Plaintiffs' Hotel Contracts generally provide thirty or forty-five days to pay an invoice from a hotel operator.

112. The imposition of a three-business-day requirement is commercially unreasonable because it does not provide adequate time for Plaintiffs to process and pay hotel operator invoices.

113. Thus, the Amendments materially impair Plaintiffs' Hotel Contracts by, among other things, reducing the processing and payment time of hotel room invoices from thirty or forty-five days to a commercially unreasonable three business days.

114. North Carolina lacks a significant and legitimate public purpose to impair Plaintiffs' contracts.

115. Plaintiffs are informed and believe that Defendants contend that the Amendments are constitutional and are not an improper impairment of Plaintiffs' contracts.



116. A present, actual and justiciable controversy exists between the parties, requiring this Court to adjudicate their respective rights and duties.

117. Plaintiffs seek a declaration that (i) the Amendments are an improper impairment of Plaintiffs' contracts and cannot be enforced against Plaintiffs; and (ii) Plaintiffs are not required to comply with the Amendments.

### COUNT III

#### THE AMENDMENTS VIOLATE THE NEXUS REQUIREMENTS OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

118. Plaintiffs incorporate by reference paragraphs 1 through 93.

119. The Commerce Clause provides Congress with the power to "regulate Commerce with Foreign Nations, and among the several states." U.S. CONST. Art. I, § 8, cl. 3.

120. The dormant, or negative, Commerce Clause prohibits certain state actions that interfere with interstate commerce when Congress does not act or regulate.

121. A state or local tax complies with the dormant Commerce Clause only if the "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Quill Corp.*, 504 U.S. at 309.

122. A taxing jurisdiction asserting nexus over a purported taxpayer must establish that the taxpayer has a substantial nexus with the taxing state consisting of a physical presence in the taxing jurisdiction.

123. Plaintiffs are located outside of North Carolina.

124. Plaintiffs do not own or maintain real or tangible property in North Carolina.

125. Plaintiffs do not have employees or agents based in North Carolina to create or maintain a market in North Carolina.

126. North Carolina lacks the substantial nexus with Plaintiffs necessary to impose Sales Tax and Room Occupancy Tax liability and other obligations on Plaintiffs.

127. In addition to having substantial nexus with a taxpayer, there must be a substantial nexus between a taxing jurisdiction and the activity it seeks to tax. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Allied Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 777-78 (1992).

128. Plaintiffs are located outside of North Carolina.

129. Plaintiffs' facilitation services are performed wholly outside of North Carolina.

130. In the vast majority of instances, Plaintiffs' consumers are located wholly outside of North Carolina.

131. Thus, with the respect to Plaintiffs' facilitation of consumers' reservations at North Carolina hotels, including hotels in Durham County, the services are performed outside of the state; the service provider is outside of the state; and the vast majority of the consumers are located outside of the state.

132. Plaintiffs' facilitation transactions lack the substantial nexus with North Carolina necessary for Defendants to impose Sales Tax or Room Occupancy Tax.

133. Plaintiffs are informed and believe that Defendants contend that the Amendments are constitutional and are not a violation of the nexus requirements of the Commerce Clause of the United States Constitution.

134. A present, actual and justiciable controversy exists between the parties, requiring this Court to adjudicate their respective rights and duties.

135. Plaintiffs seek a declaration that (i) as applied to Plaintiffs, the Amendments violate the substantial nexus requirements of the Commerce Clause of the United States Constitution and cannot be enforced against Plaintiffs; and (ii) Plaintiffs are not required to comply with the Amendments.

#### **COUNT IV**

#### **THE AMENDMENTS VIOLATE THE FAIR APPORTIONMENT REQUIREMENT OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION**

136. Plaintiffs incorporate by reference paragraphs 1 through 93.

137. The Commerce Clause of the United States Constitution requires that state and local taxation of an interstate business be fairly apportioned so that the interstate business is not subjected to more burdensome taxation than a business that operates in a single state.

138. A state's fair share of tax on an interstate business is the amount of tax measured by the economic activity of the interstate business that is attributable to the taxing state.

139. The imposition of a sales tax on an interstate service transaction is allowed in the jurisdiction in which the agreement to provide the service is made, some part of the service is rendered and payment is made. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 190 (1995).

140. The transaction between a Plaintiff and a consumer takes place outside the state.

141. Plaintiffs maintain complex infrastructure of computer hardware and software to allow consumers to research and request reservations online.

142. All of the computer hardware and software used for Plaintiffs' websites is located outside of North Carolina.

143. A potential consumer who visits one of Plaintiffs' websites to make a hotel reservation receives information about hotels from computers located outside of North Carolina. This information includes descriptions of the hotels' locations, prices, amenities, and availability on selected dates.

144. The consumer's request for a reservation is processed through Plaintiffs' computers located outside of North Carolina.

145. During a transaction, the consumer supplies his or her credit card information, and that information is received by Plaintiffs' computers located outside of North Carolina.

146. The confirmation of the requested accommodations is communicated to the consumer through Plaintiffs' computers located outside of North Carolina.

147. According to the contract between a consumer and a Plaintiff, the relationship between the consumer and a Plaintiff is governed by the law of the state where the Plaintiff is incorporated or the state where it maintains its principal place of business.

148. The Facilitation Fee is a Plaintiff's compensation for its services.

149. Because the agreement between a consumer and a Plaintiff is made outside of North Carolina, and because the Plaintiff's services are rendered outside of North Carolina, the Facilitation Fee is the value that is fairly attributable to economic activity in the state where those events occur and not to any activity in North Carolina.

150. The Amendments attribute the Facilitation Fee to North Carolina by defining the Facilitation Fee to be part of the "gross receipts" of the North Carolina hotel operator. The hotel operator does not receive the Facilitation Fee.

151. North Carolina's purported imposition of tax on the Facilitation Fee thus violates the fair apportionment requirement of the Commerce Clause of the United States Constitution.

152. Plaintiffs are informed and believe that Defendants contend that the Amendments are constitutional and are not a violation of the fair apportionment requirement of the Commerce Clause of the United States Constitution.

153. A present, actual and justiciable controversy exists between the parties, requiring this Court to adjudicate their respective rights and duties.

154. Plaintiffs seek a declaration that (i) as applied to Plaintiffs, the Amendments violate the fair apportionment requirement of the Commerce Clause of the United States Constitution and cannot be enforced against Plaintiffs; and (ii) Plaintiffs are not required to comply with the Amendments.

#### **COUNT V**

#### **THE AMENDMENTS VIOLATE THE PROHIBITION OF DISCRIMINATION AGAINST INTERSTATE COMMERCE REQUIREMENT OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION**

155. Plaintiffs incorporate by reference paragraphs 1 through 93.

156. The Commerce Clause of the United States Constitution prohibits taxes that discriminate against interstate commerce.

157. The Amendments impose Sales Tax and Room Occupancy Tax upon Plaintiffs, which are located outside of North Carolina and conduct their business over the Internet.

158. The practical operation of the Amendments is to burden interstate commerce by modifying contracts and taxing Facilitation Fees of Plaintiffs and other out-of-state online travel companies, without imposing similar burdens on TPIs within North Carolina.

159. Additionally, the Amendments do not provide a credit for taxes that Plaintiffs may be subject to in the jurisdictions in which they are resident, creating a substantial risk of multiple taxation that unfairly burdens and discriminates against interstate commerce.

160. Plaintiffs are informed and believe that Defendants contend that the Amendments are constitutional and do not discriminate against interstate commerce.

161. A present, actual and justiciable controversy exists between the parties, requiring this Court to adjudicate their respective rights and duties.

162. Plaintiffs seek a declaration that (i) as applied to Plaintiffs, the Amendments violate the Commerce Clause of the United States Constitution and cannot be enforced against Plaintiffs because the Amendments discriminate against interstate commerce; and (ii) Plaintiffs are not required to comply with the Amendments.

#### **COUNT VI**

#### **THE AMENDMENTS VIOLATE THE FAIRLY RELATED REQUIREMENT OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION**

163. Plaintiffs incorporate by reference paragraphs 1 through 93.

164. The Commerce Clause of the United States Constitution requires that a tax be fairly related to services provided by the taxing state.

165. Until the effective date of the Amendments, the Defendants received Sales Tax or Room Occupancy Tax based on the amounts received by retailers for their provision of accommodations.

166. Those amounts represented the retailers' valuation of the services they provide and serve as a fair measure of the value of the services provided by the state, county and city for a rental of accommodations.

167. Under the Amendments, Plaintiffs, not retailers or consumers, bear the burden of the Sales Tax and Room Occupancy Taxes on accommodation rentals facilitated by Plaintiffs.

168. The state, county and city do not provide any services that support Plaintiffs' operation of their online businesses which are located outside North Carolina.

169. The purported imposition of tax on the Facilitation Fee thus violates the "fairly related" requirement of the Commerce Clause of the United States Constitution.

170. Plaintiffs are informed and believe that Defendants contend that the Amendments are constitutional and are not a violation of the fairly related requirement of the Commerce Clause of the United States Constitution.

171. A present, actual and justiciable controversy exists between the parties, requiring this Court to adjudicate their respective rights and duties.

172. Plaintiffs seek a declaration that (i) as applied to Plaintiffs, the Amendments violate the fairly related requirement of the Commerce Clause of the United States Constitution and cannot be enforced against Plaintiffs; and (ii) Plaintiffs are not required to comply with the Amendments.



## COUNT VII

### **THE AMENDMENTS VIOLATE THE UNIFORMITY CLAUSE OF THE NORTH CAROLINA CONSTITUTION AND THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS BY CREATING AN UNREASONABLE CLASSIFICATION**

173. Plaintiffs incorporate by reference paragraphs 1 through 93.

174. Under Article V, Section 2(2) of the Constitution of North Carolina, "[n]o class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government."

175. Under Article I, Section 19 of the Constitution of North Carolina, "[n]o person shall be denied the equal protection of the laws...."

176. Under the Fourteenth Amendment to the United States Constitution, "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

177. Uniformity and equal protection have the same requirements under the North Carolina and United States Constitutions.

178. Before the Amendments, the Sales Tax, complementary Use Tax, and the Room Occupancy Taxes were imposed only on retailers and consumers.

179. Retailers subject to the Sales Tax and the Room Occupancy Taxes are taxed on their gross receipts for the privilege of engaging in the business of making retail sales in North Carolina.

180. Retailers are required to pass the burden of the Sales Tax and Room Occupancy Taxes on to consumers.

181. Consumers are subject a complementary Use Tax, which is an excise tax for storage, use, or consumption of certain property in North Carolina specified in N.C. Gen. Stat. § 105-164.6.

182. The Amendments purport to expand the class of persons subject to the Sales Tax and Room Occupancy Taxes to include facilitators, including the Plaintiffs.

183. Although the Sales Tax and Room Occupancy Taxes are imposed on retailers and although the burdens of the Sales Tax and Room Occupancy Taxes are imposed on purchasers, under the Amendments both the retailer and the purchaser of a hotel room rental facilitated by a Plaintiff under the Prepaid Model are exempted from the Sales Tax and Room Occupancy Taxes.

184. The attempt to subject Plaintiffs to the Sales Tax and Room Occupancy Taxes creates an unreasonable classification because Plaintiffs do not share any relevant characteristics with either retailers or consumers.

185. Plaintiffs do not engage in business within North Carolina because they do not maintain a place of business in North Carolina, and because Plaintiffs' activities involved in making arrangements for the rental of rooms under the Prepaid Model (management of website, receipt of reservation request, booking of reservation, and consumer confirmation) take place outside of North Carolina.

186. Plaintiffs do not exercise any privilege subject to tax by North Carolina.

187. Plaintiffs' gross receipts from Facilitation Fees are never received by retailers.

188. Plaintiffs do not share any relevant characteristics with retailers who are subject to the Sales Tax and Room Occupancy Taxes.

189. Plaintiffs do not store, use or consume accommodations in North Carolina.

190. Plaintiffs do not share any relevant characteristics with consumers who are subject to the Use Tax and on whom the burdens of the Sales Tax and Room Occupancy Taxes are imposed.

191. The Amendments' purported inclusion of Plaintiffs in the class of persons subject to the Sales Tax and Room Occupancy Taxes creates an unreasonable classification in violation of the Uniformity Clause of the North Carolina Constitution and the Equal Protection Clauses of the United States and North Carolina Constitutions.

192. Plaintiffs are informed and believe that Defendants contend that the Amendments are constitutional and are not a violation of the Uniformity Clause of the North Carolina Constitution or of the Equal Protection Clauses of the United States and North Carolina Constitutions.

193. A present, actual and justiciable controversy exists between the parties, requiring this Court to adjudicate their respective rights and duties.

194. Plaintiffs seek a declaration that (i) as applied to Plaintiffs, the Amendments violate the Uniformity Clause of the North Carolina Constitution and/or the Equal

Protection Clauses of the United States and North Carolina Constitutions and therefore cannot be enforced against Plaintiffs; and (ii) Plaintiffs are not required to comply with the Amendments.

### **COUNT VIII**

#### **THE AMENDMENTS ARE VOID FOR VAGUENESS**

195. Plaintiffs incorporate by reference paragraphs 1 through 93.

196. The Sales Tax and Room Occupancy Taxes, as amended, can be interpreted in various ways, such that a person of ordinary intelligence cannot determine what acts are required or prohibited of a facilitator, and the attendant consequences.

197. The Amendments purport to make facilitators, not retailers, "liable" for Sales Tax and Room Occupancy Taxes on facilitated rentals of accommodations, but only retailers are required to register and collect Sales Tax or Room Occupancy Taxes from consumers.

198. The Amendments fail to indicate whether a facilitator is "liable" to the retailer or to the taxing jurisdiction.

199. Accordingly, a person of ordinary intelligence could not determine whether a facilitator is allowed to, required to, or prohibited from collecting Sales Tax and Room Occupancy Taxes from a consumer.

200. The collection and remittance responsibilities of a "facilitator" under the Amendments are vague and ambiguous; thus, a person of ordinary intelligence could not determine the consequences of proceeding under a reasonable interpretation of the Amendments, as such interpretation could subsequently be determined improper.

201. Plaintiffs are informed and believe that Defendants contend that the Amendments are constitutional and are not void for vagueness.

202. A present, actual and justiciable controversy exists between the parties, requiring this Court to adjudicate their respective rights and duties.

203. Plaintiffs seek a declaration that (i) as applied to Plaintiffs, the Amendments are void for vagueness and cannot be enforced against Plaintiffs; and (ii) Plaintiffs are not required to comply with the Amendments.

## **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs request that this Court issue a declaratory judgment against the Defendants:

1. Declaring and adjudging that:
  - a. The Amendments violate the Internet Tax Freedom Act, and are invalid and cannot be enforced against Plaintiffs; and/or
  - b. The Amendments are unconstitutional and illegal as applied to Plaintiffs as an impairment of Plaintiffs' contracts, and are invalid and cannot be enforced against Plaintiffs; and/or
  - c. The Amendments are unconstitutional and illegal as applied to Plaintiffs under the substantial nexus requirements of the Commerce Clause of the Constitution of the United States, and are invalid and cannot be enforced against Plaintiffs; and/or
  - d. The Amendments are unconstitutional and illegal as applied to Plaintiffs under the fair apportionment requirement of the Commerce Clause of the Constitution of the United States, and are invalid and cannot be enforced against Plaintiffs; and/or
  - e. The Amendments are unconstitutional and illegal as applied to Plaintiffs under the Commerce Clause of the Constitution of the United States because the Amendments discriminate against interstate commerce, and are invalid and cannot be enforced against Plaintiffs; and/or
  - f. The Amendments are unconstitutional and illegal as applied to Plaintiffs under the fairly related requirement of the Commerce Clause of the Constitution of the United States, and are invalid and cannot be enforced against Plaintiffs;
  - g. The Amendments are unconstitutional and illegal as applied to Plaintiffs under the Uniformity Clause of the North Carolina Constitution and/or the Equal

Protection Clauses of the Constitutions of the United States and North Carolina, and are invalid and cannot be enforced against Plaintiffs; and/or

h. The Amendments are unconstitutional and illegal as being void for vagueness, and are invalid and cannot be enforced against Plaintiffs; and/or

2. Awarding Plaintiffs the costs and disbursements of this proceeding;
3. Awarding Plaintiffs' attorneys fees; and
4. Granting such other and further relief, legal or equitable, as the Court

deems just and proper.

Dated: Raleigh, North Carolina  
Feb. 4, 2011

WILLIAMS MULLEN

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EXHIBIT A

**MODERNIZE SALES TAX ON ACCOMMODATIONS**

SECTION 31.6.(a) G.S. 105-164.4(a)(3) reads as rewritten:

"§ 105-164.4. Tax imposed on retailers.

(a) A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is five and three-quarters percent (5.75%).

- (3) ~~Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses and persons who rent private residences and cottages to transients are considered retailers under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from the rental of any rooms, lodgings, or accommodations furnished to transients for a consideration. This tax does not apply to any private residence or cottage that is rented for less than 15 days in a calendar year or to any room, lodging, or accommodation supplied to the same person for a period of 90 or more continuous days.~~

~~As used in this subdivision, the term "persons who rent to transients" means (i) owners of private residences and cottages who rent to transients and (ii) rental agents, including "real estate brokers" as defined in G.S. 93A-2, who rent private residences and cottages to transients on behalf of the owners. If a rental agent is liable for the tax imposed by this subdivision, the owner is not liable. A tax at the general rate applies to the gross receipts derived from the rental of an accommodation. The tax does not apply to a private residence or cottage that is rented for fewer than 15 days in a calendar year or to an accommodation rented to the same person for a period of 90 or more continuous days.~~

~~Gross receipts derived from the rental of an accommodation include the sales price of the rental of the accommodation. The sales price of the rental of an accommodation is determined as if the rental were a rental of tangible personal property. The sales price of the rental of an accommodation marketed by a facilitator includes charges designated as facilitation fees and any other charges necessary to complete the rental.~~

~~A person who provides an accommodation that is offered for rent is considered a retailer under this Article. A facilitator must report to the retailer with whom it has a contract the sales price a consumer pays to the facilitator for an accommodation rental marketed by the facilitator. A retailer must notify a facilitator when an accommodation rental marketed by the facilitator is completed and, within three business days of receiving the notice, the facilitator must send the retailer the portion of the sales price the facilitator owes the retailer and the tax due on the sales price. A facilitator that does not send the retailer the tax due on the sales price is liable for the amount of tax the facilitator fails to send. A facilitator is not liable for tax sent to a retailer but not remitted by the retailer to the Secretary. Tax payments received by a retailer from a facilitator are held in trust by the retailer for remittance to the Secretary. A retailer that receives a tax payment from a facilitator must remit the amount received to the Secretary. A retailer is not liable for tax due but not received from a facilitator. The requirements imposed by this subdivision on a retailer and a facilitator are considered terms of the contract between the retailer and the facilitator.~~

~~A person who, by written contract, agrees to be the rental agent for the provider of an accommodation is considered a retailer under this Article and is liable for the tax imposed by this subdivision. The liability of a rental agent for the tax imposed by this subdivision relieves the provider of the accommodation from liability. A rental agent includes a real estate broker, as defined in G.S. 93A-2.~~

The following definitions apply in this subdivision:

- a. Accommodation. – A hotel room, a motel room, a residence, a cottage, or a similar lodging facility for occupancy by an individual.
- b. Facilitator. – A person who is not a rental agent and who contracts with a provider of an accommodation to market the accommodation and to accept payment from the consumer for the accommodation."

SECTION 31.6.(b) G.S. 105-164.4B is amended by adding a new subsection to read:

"(e) Accommodations. – The rental of an accommodation, as defined in G.S. 105-164.4(a)(3), is sourced to the location of the accommodation."

SECTION 31.6.(c) G.S. 153A-155(c) reads as rewritten:

"(c) Collection. – Every operator of a business subject to a room occupancy tax shall, on and after the effective date of the levy of the tax, collect the tax. The tax shall be collected as part of the charge for furnishing a taxable accommodation. A retailer who is required to remit to the Department of Revenue the State sales tax imposed by G.S. 105-164.4(a)(3) on accommodations is required to remit a room occupancy tax to the taxing county on and after the effective date of the levy of the room occupancy tax. The room occupancy tax applies to the same gross receipts as the State sales tax on accommodations and is calculated in the same manner as that tax. A rental agent or a facilitator, as defined in G.S. 105-164.4(a)(3), has the same responsibility and liability under the room occupancy tax as the rental agent or facilitator has under the State sales tax on accommodations.

If a taxable accommodation is furnished as part of a package, the bundled transaction provisions in G.S. 105-164.4D apply in determining the sales price of the taxable accommodation. If those provisions do not address the type of package offered, the operator person offering the package may determine an allocated price for each item in the package based on a reasonable allocation of revenue that is supported by the operator's person's business records kept in the ordinary course of business and collect calculate tax on the allocated price of the taxable accommodation.

The tax shall be stated and charged separately from the sales records and shall be paid by the purchaser to the operator of the business. A retailer must separately state the room occupancy tax. Room occupancy taxes paid to a retailer are held in trust as trustee for and on account of the taxing county. The tax shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the operator of the business.

The taxing county shall design, print, design and furnish to all appropriate businesses and persons in the county the necessary forms for filing returns and instructions to ensure the full collection of the tax. An operator of a business. A retailer who collects a room occupancy tax may deduct from the amount remitted to the taxing county a discount equal to the discount the State allows the operator retailer for State sales and use tax."

SECTION 31.6.(d) G.S. 153A-155(g) reads as rewritten:

"(g) Applicability. – Subsection (c) of this section applies to all counties and county districts that levy an occupancy tax. To the extent subsection (c) conflicts with any provision of a local act, subsection (c) supersedes that provision. The remainder of this This section applies only to Alleghany, Anson, Brunswick, Buncombe, Burke, Cabarrus, Camden, Carteret, Caswell, Chatham, Cherokee, Chowan, Clay, Craven, Cumberland, Currituck, Dare, Davie, Duplin, Durham, Forsyth, Franklin, Granville, Halifax, Haywood, Madison, Martin, McDowell, Montgomery, Nash, New Hanover, New Hanover County District U, Northampton, Pasquotank, Pender, Perquimans, Person, Randolph, Richmond, Rockingham, Rowan, Sampson, Scotland, Stanly, Swain, Transylvania, Tyrrell, Vance, Washington, and Wilson Counties, to Surry County District S, to Watauga County District U, to Yadkin County District Y, and to the Township of Averagesboro in Harnett County and the Ocracoke Township Taxing District."

SECTION 31.6.(e) G.S. 160A-215(c) reads as rewritten:

"(c) Collection. – Every operator of a business subject to a room occupancy tax shall, on and after the effective date of the levy of the tax, collect the tax. The tax shall be collected as part of the charge for furnishing a taxable accommodation. A retailer who is required to remit to the Department of Revenue the State sales tax imposed by G.S. 105-164.4(a)(3) on accommodations is required to remit a room occupancy tax to the taxing city on and after the

effective date of the levy of the room occupancy tax. The room occupancy tax applies to the same gross receipts as the State sales tax on accommodations and is calculated in the same manner as that tax. A rental agent or a facilitator, as defined in G.S. 105-164.4(a)(3), has the same responsibility and liability under the room occupancy tax as the rental agent or facilitator has under the State sales tax on accommodations.

If a taxable accommodation is furnished as part of a package, the bundled transaction provisions in G.S. 105-164.4D apply in determining the sales price of the taxable accommodation. If those provisions do not address the type of package offered, the operator person offering the package may determine an allocated price for each item in the package based on a reasonable allocation of revenue that is supported by the operator's person's business records kept in the ordinary course of business and ~~collect~~ calculate tax on the allocated price of the taxable accommodation.

~~The tax shall be stated and charged separately from the sales records and shall be paid by the purchaser to the operator of the business. A retailer must separately state the room occupancy tax. Room occupancy taxes paid to a retailer are held in trust as trustee for and on account of the taxing city. The tax shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the operator of the business.~~

The taxing city shall ~~design, print, design~~ and furnish to all appropriate businesses and persons in the city the necessary forms for filing returns and instructions to ensure the full collection of the tax. An operator of a business who collects a room occupancy tax may deduct from the amount remitted to the taxing city a discount equal to the discount the State allows the ~~operator-retailer~~ for State sales and use tax."

**SECTION 31.6.(f)** G.S. 160A-215(g) reads as rewritten:

"(g) Applicability. – Subsection (c) of this section applies to all cities that levy an occupancy tax. To the extent subsection (c) conflicts with any provision of a local act, subsection (c) supersedes that provision. The remainder of this This section applies only to Beech Mountain District W, to the Cities of Belmont, Conover, Eden, Elizabeth City, Gastonia, Goldsboro, Greensboro, Hickory, High Point, Jacksonville, Kings Mountain, Lenoir, Lexington, Lincolnton, Lowell, Lumberton, Monroe, Mount Airy, Mount Holly, Reidsville, Roanoke Rapids, Salisbury, Shelby, Statesville, Washington, and Wilmington, to the Towns of Ahoskie, Beech Mountain, Benson, Blowing Rock, Boiling Springs, Boone, Burgaw, Carolina Beach, Carrboro, Cramerton, Dallas, Dobson, Elkin, Franklin, Jonesville, Kenly, Kure Beach, Leland, McAdenville, Mooresville, Murfreesboro, North Topsail Beach, Pilot Mountain, Ranlo, Selma, Smithfield, St. Pauls, Troutman, Tryon, West Jefferson, Wilkesboro, Wrightsville Beach, Yadkinville, and Yanceyville, and to the municipalities in Avery and Brunswick Counties."

**SECTION 31.6.(g)** This act becomes effective January 1, 2011, and applies to gross receipts derived from the rental of an accommodation that a consumer occupies or has the right to occupy on or after that date.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following person via certified mail in accordance with Rule 4 of the North Carolina Rules of Civil Procedure and G.S. 1-260:

Roy Cooper, Attorney General of North Carolina  
9001 Mail Service Center  
Raleigh, NC 27699-9001

This the 4<sup>th</sup> day of February, 2011.

WILLIAMS MULLEN

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